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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN FRANCISCO OCHOA,

Defendant and Appellant.

E070319

(Super.Ct.No. INF1700628)

OPINION

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge.  
(Retired Judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to  
art. VI, § 6 of the Cal. Const.) Affirmed with directions.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and  
Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Juan Francisco Ochoa was charged by second amended information with attempted murder (Pen. Code,<sup>1</sup> §§ 664, 187, subd. (a), count 1), assault with a deadly weapon (§ 245, subd. (a)(1), count 2), and misdemeanor battery (§ 242, count 3). As to counts 1 and 2, the amended information alleged that he personally inflicted great bodily injury. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).) It further alleged that defendant had one prior serious felony conviction, within the meaning of section 667, subdivision (a), and sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). A jury found defendant guilty of counts 2 and 3, but not guilty of count 1. The jury also found the great bodily injury enhancement on count 2 to be not true. Defendant admitted the prior conviction allegations. Prior to sentencing, a trial court granted defendant's motion to dismiss the prior strike conviction, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court sentenced defendant to four years on count 2, a concurrent 180 days in county jail on count 3, and a consecutive five years on the prior serious felony enhancement (§ 667, subd. (a)), for a total term of nine years in state prison.

Defendant filed a timely appeal, and his appointed counsel initially filed a *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)), requesting that we independently review the record to determine whether there were any arguable issues on appeal. We found no arguable issues and affirmed the judgment.

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise noted.

Defendant filed a petition for rehearing asserting that after his opening brief was filed, the Governor signed legislation that would vest trial courts with the discretion to strike a serious felony conviction enhancement. (§ 667, subd. (a).) We denied rehearing because the amendment had not gone into effect yet. Defendant filed a petition for review with the California Supreme Court.

The Supreme Court granted review and transferred the matter back to this court with directions to vacate our previous decision and reconsider the cause in light of newly enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.) We vacated our previous decision and invited the parties to file supplemental briefs on the issue. Defendant filed a supplemental brief, but the People did not.

Senate Bill No. 1393 is applicable here, and we remand the matter for the trial court to exercise its discretion as to whether it should strike the serious felony conviction enhancement. (§ 667, subd. (a).) In all other respects, we previously found no arguable issues and affirm the judgment.

#### FACTUAL BACKGROUND

Defendant was employed as a handyman by his nephew (the victim), who owned a Spanish newspaper. One day, defendant was at work and started cussing out loud. The victim tried to calm him down, but defendant told him to shut up and leave him alone. Defendant threw all his tools on the ground, jumped in his car, and “peeled out.” He did not show up to work the rest of the week, so the victim assumed he did not want to work

there any longer. The victim went to defendant's house the following weekend to return the tools.

The next day, defendant drove to the victim's office. Defendant said some of his tools were missing, and the victim needed to pay him for them. He looked for them in the office and started cussing at the victim when he could not find them. Defendant then asked the victim where his paycheck was. The victim handed him a check. Defendant reached for the check and then punched the victim on the forehead. The victim pushed defendant out of the office, and defendant continued punching him. Defendant threatened to "get [him]" and break the windows on his car and front office. He went to his van and pulled out a sledge hammer or a pick axe.<sup>2</sup> Defendant was enraged at that point and walked toward the victim and started to swing the tool like a baseball bat. The victim "rushed him" to try and avoid the swinging motion. However, defendant looked right at him and swung the tool. It hit the victim the on top of his head, and "a burst of blood came out."

The victim put his arms around defendant and tackled him. They both fell to the ground. The victim got defendant in a headlock, but released him. Defendant said it was not over, started yelling, and took off in his van.

A short time later, the police responded. The victim participated in an in-field identification and then went to urgent care. He received seven stitches in his head.

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<sup>2</sup> At trial, the victim said he was not sure what the tool was called.

Defendant testified on his own behalf at trial and said he was angry with the victim and got a pick axe. He said he threatened to do something to the victim's car, but would never swing the pick axe at him.

### ANALYSIS

Initially, defendant's appointed counsel on appeal filed a *Wende* brief requesting that we independently review the record to determine whether there were any arguable issues on appeal. Under *People v. Kelly* (2006) 40 Cal.4th 106, we conducted an independent review of the record and found no arguable issues.

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes, in furtherance of justice. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Defendant now claims Senate Bill No. 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious felony conviction, provided the judgment of conviction was not final when Senate Bill No. 1393 became effective on January 1, 2019. We agree. (*Garcia, supra*, 28 Cal.App.5th at pp. 971-973.)

Defendant's case was not final before the effective date of Senate Bill No. 1393. Therefore, we remand the matter for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement.

DISPOSITION

The matter is remanded with directions for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) enhancement, pursuant to Senate Bill No. 1393. In all other respects, the judgment is affirmed.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

SLOUGH  
J.